Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Reexamination of Roaming	)	WT Docket No. 05-265
Obligations of Commercial Mobile	)	
Radio Service Providers	)	

COMMENTS OF THE SAFE COMPETITION COALITION

The Safety and Frequency Equity Competition Coalition ("SAFE"), an association of certain Specialized Mobile Radio Service ("SMR") licensees planning to construct high density cellular systems in accordance with the Commission's recently-adopted requirements for relocation into the new ESMR segment of the 800 MHz Band,[1] by its attorneys, hereby responds to the Notice of Proposed Rule Making in the above-referenced matter ("Notice").[2] SAFE members include Coastal SMR Network, LLC; A.R.C., Inc. d/b/a Antenna Rentals Corp; Skitronics, LLC; Waccamaw Wireless, LLC; and CRSC Holdings, Inc.

SAFE's members, as small and independent new entrants to the mobile telephony market, seek a level playing field to survive the 800 MHz re-banding process and to compete with other carriers offering mobile telephony service within their region. The Commission's

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[1] *See* Improving Public Safety Communications in the 800 MHz Band, Report and Order, 19 FCC Rcd 14969 (2004) ("*Report and Order*"); Improving Public Safety Communications in the 800 MHz Band, Supplemental Order and Order on Reconsideration, 19 FCC Rcd 25120, 25152 (¶72) (2004) ("*Supplemental Order*"); Improving Public Safety Communications in the 800 MHz Band Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels, Memorandum Opinion and Order, WT Docket 02-55, FCC 05-174 (October 5, 2005) ("*MO&O*").

[2] *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket 05-265 (August 31, 2005)("*Notice*").

future rules regarding roaming, if any, will play a decisive role in determining their survival and strength as new competitors the mobile telephony marketplace. Customers of such smaller entrants will expect a substantial degree of seamless roaming with other carriers, not only on those systems operating in the new 800 MHz ESMR band, such as AirPeak/AirTel, SouthernLinc and Sprint Nextel, but on other systems, especially those of large national carriers, in bands accessible by modern, feature-rich multi-band handsets ("technically-compatible handsets").[3]

Future customers of the systems to be constructed by SAFE members will expect their technically-compatible handsets to work wherever service is offered by other large competitors with technically-compatible systems. Accordingly, SAFE advocates the adoption of an automatic roaming requirement sufficient to ensure that competing carriers in their region and the larger national carriers, *e.g.,* Sprint Nextel, Cingular, Verizon Wireless, and T-Mobile, are required to enter into roaming agreements under non-discriminatory rates, terms, and conditions, with such smaller entrants, *e.g.*, SAFE members, where technically-compatible handsets are offered to customers.

SAFE voiced its general concerns regarding these issues in its Petition to Deny the Sprint Nextel merger application. Those concerns were echoed in recent bi-partisan letters from Congress to the FCC Chairman. In subsequent filings by SAFE, made before the merger application was granted, SAFE advocated conditions on the grant of the merger application including, among other things, that the merger applicants be required "to enter into binding roaming agreements at fair and equitable rates with SAFE members for at least a ten-year period,

[3] SAFE members have sought discussions with handset manufacturers regarding the availability of multi-band handset for use in the new ESMR segment of the upper 800 MHz band, but have received no assurances that such handsets will be made available to small entrants.

before consummation of the merger."[4] The Commission declined to adopt this type of condition. Instead, it adopted only a limited roaming-related condition – the prohibition against Sprint Nextel restricting its customers from roaming on the networks of smaller regional carriers. The Commission did not address SAFE's roaming-related concerns, including SAFE's request that Nextel be required to disclose, among other things, all existing arrangements with independent, regional, SMR dispatch service providers including roaming and resale agreements, as well as all arrangements with equipment vendors.

An automatic roaming requirement is necessary and in the public interest to ensure that smaller entrants do not fall victim to anticompetitive practices and discrimination by the larger national CMRS carriers. The existing manual roaming requirement, if implemented in its simplest form, would likely result in service interruption and great customer dissatisfaction. A simple manual roaming regime would likely stigmatize the service offerings of smaller entrants to their competitive disadvantage in the marketplace. Even if manual roaming is offered by a carrier in the more complex form described in the Notice, it would require roaming agreements that the larger national carriers are not currently obligated to provide.

In addition to an automatic roaming requirement, the Commission should consider adopting safeguards to ensure that larger national carriers do not block smaller entrants' access to technically-compatible handsets and system hardware. Such safeguards might take the form of a prohibition against exclusive arrangements with handset and system equipment suppliers. Safeguards of this type are necessary and desirable given the incentives for larger carriers to discriminate in roaming practices against smaller entrants. An automatic roaming requirement could easily be rendered meaningless without such additional safeguards. Larger

[4] *See* Letter to FCC Secretary dated August 3, 2005, filed in WT docket Number 05-63 (attached hereto as Appendix A).

carriers essentially could block competing smaller entrants from offering customers seamless roaming opportunities, even if required to make such roaming opportunities available on a non-discriminatory basis, simply by preventing smaller entrants from acquiring technically-compatible handsets and system hardware.

The adoption of an automatic roaming requirement is justified by market conditions. When the Commission last considered and deferred the issue of an automatic roaming requirement in 2000, the competitive landscape of the CMRS industry was radically different. Virtually all of the carriers were in earlier stages of development of digital networks. There were a greater number of competing carriers and a greater number of smaller regional competitors. Substantial consolidation has occurred, essentially resulting in a marketplace with four national carriers, Sprint Nextel, Cingular, Verizon Wireless and T-Mobile. Further consolidation is likely.[5]

The Commission has noted that a "concentrated market, in conjunction with significant entry barriers, may lessen competition in the market[.]"[6] The lack of roaming rights for smaller competitors would constitute a substantial barrier to entry. The Commission has noted that the average Herfindahl-Hirschman Index ("HHI") for all the Economic Areas weighted by population is 2450.[7] SAFE members operate in two EAs with significantly higher HHIs than the national average – Asheville, NC at 3609, and Greenville-Spartanburg-Anderson,

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[5] *See, e.g.*, Sprint Nextel's proposed $4.3 billion acquisition of Alamosa Holdings, Inc., RCR Wireless News, p. 1 (November 28, 2005).

[6] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Tenth Report*, FCC 05-173, at para. 96 (2005) ("*10th Competition Report*").

[7] *10th Competition Report* at 96.

SC-NC, at 2731.[8] Moreover, the Department of Justice's merger guidelines provide that markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated.[9] Even if the relatively concentrated CMRS marketplace can be characterized as effectively competitive, that does not prevent larger national carriers from discriminating in their roaming practices against smaller entrants – it would merely act to constrain their pricing behavior affecting consumers.

The existing remedies for small entrants to seek redress from the Commission for anticompetitive roaming practices of larger CMRS carriers are wholly inadequate. The time required to prosecute a complaint to a successful decision under Sections 201, 202, 208, 251 and 332 of the Communications Act of 1934, as amended, has proven much too long to ensure the survival of an aggrieved smaller entrant in the marketplace. In the long-run, where such anticompetitive practices exist, the small entrants will all be "dead" – despite the merits of their Section 208 complaints – by the time the Commission acts on the complaint.

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[8] *10th Competition Report* at Appendix C.

[9] *See* Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission.

For the reasons set forth above, the Commission should adopt pro-competitive roaming requirements and related safeguards to ensure robust competition and a level playing field for smaller entrants.

Respectfully submitted,

SAFETY AND FREQUENCY EQUITY COMPETITION COALITION

By: ______________________

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November 28, 2005

Appendix A

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Federal Communications Commission
Office of the Secretary

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August 3, 2005

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BY HAND DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

Re: Notice of Oral *Ex Parte* Presentations –
Sprint-Nextel Transfer of Control Applications
(WT Docket No. 05-63)

Dear Ms. Dortch:

On August 3, 2005, Mr. Dan Hobson, President of Performance Industries, and the undersigned, representatives of the Safety and Frequency Equity Competition Coalition ("SAFE"), met with Mr. Barry Ohlson, Legal Advisor to Commissioner Adelstein, regarding the above-referenced proceeding.

SAFE's representatives explained the merger-related concerns of the small, regional dispatch-service competitors of Sprint and Nextel, which comprise SAFE's membership. Reference was made to the SAFE Competition Coalition Petition to Deny filed in WT Docket No. 05-63. In sum, the competitive harms of the proposed merger to smaller, independent firms in the dispatch service market are significant. While they stem, in part, from the imbalance created by the harm to SAFE members and the advantages to Nextel in the reconfiguration of the 800 MHz band, in the absence of appropriate merger conditions, they are sharply worsened by the proposed combination of Sprint and Nextel (both providers of "push-to-talk" or "walkie-talkie" services, with integrated mobile telephony). Without appropriate conditions on the merger, smaller unaffiliated competitors, such as SAFE members, will suffer significant economic harm.

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SAFE's representatives reported that despite SAFE's efforts to resolve its concerns through face-to-face meetings with the merger applicants directly, no bona fide offer of settlement has been received to date. Accordingly, SAFE requests, as a condition of the merger, that the Commission: (1) require Nextel to agree to share the new cellularized 800 MHz band segment (862 MHz and above) with SAFE members to accommodate the relocation of all their site-specific licenses, on the terms and conditions described in SAFE's Petition for Partial Reconsideration in WT Docket No. 02-55; and (2) require the merger applicants to each agree to enter into binding roaming agreements at fair and equitable rates with SAFE members for at least a ten-year period, before consummation of the merger.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office, with a copy to Mr. Ohlson.

Respectfully submitted,

Julian Shepard

Julian L. Shepard

cc: Mr. Barry Ohlson